No. 18-266

IN THE
Supreme Court of the United States

THE DUTRA GROUP,
Petitioner,

v.

CHRISTOPHER BATTERTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

ELISE SANGUINETTI
President
JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

ROBERT S. PECK
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
455 Massachusetts Ave. NW, Suite 152
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. Petitioner Greatly Exaggerates the Adverse Impact Punitive Damages in Personal Injury Actions Has on the Maritime Industry and the American Economy Generally. 6

A. Punitive Damage Awards Are Relatively Infrequent, Moderate in Amount, and Rationally Predictable, as this Court Has Recognized. 8

B. This Court Has Found Criticism of Punitive Damages, Like Those Set Forth by Petitioner, Undercut by Empirical Studies.. 9

C. More Recent Studies Also Undermine Criticism of Punitive Damages. 12

II. The Purported "Shadow Effect" of Punitive Damages Has No Basis in Reality. 14

A. Petitioner and Supporting Amici Rely on Unsupported Assertions that Fear of Unpredictable and Large Punitive Damage Verdicts Forces Defendants to Settle Meritless Cases. 14

B. There Is No Evidence that Defendants Routinely Settle Meritless Cases Out of Fear that a Jury May Award Punitive Damages. 17

C. Empirical Studies Show There Is No Significant "Shadow Effect." 18

D. Petitioner's Purported "Shadow Effect" Is Grounded in a Myth that Punitive Damage Claims Are Easily and Routinely Presented to Juries. 23

III. The Availability of Punitive Damages Provides Financial Incentive for Vessel Owners to Avoid Exposing Seamen to Known Dangerous Conditions, Resulting in Greater Safety and Benefiting the Maritime Industry 30

A. The Availability of Punitive Damages Effectively and Efficiently Protects the Public From Egregious, Socially Harmful Misconduct 30

B. Punitive Damage Awards Do Not Result in Overdeterrence of Socially Beneficial Conduct. 35

CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Atl. Sounding Co., Inc. v. Townsend,
557 U.S. 404 (2009) 6, 17, 27

Barry v. Edmunds,
116 U.S. 550 (1886) 30

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 36

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 8

Charpentier v. Blue Streak Offshore, Inc.,
1997 WL 426093 (E.D. La. July 29, 1997) 34

Ciraolo v. City of New York,
216 F.3d 236 (2d Cir. 2000) 31

Clausen v. Icicle Seafoods, Inc.,
272 P.3d 827 (Wash. 2012) 34

Day v. Woodworth,
54 U.S. 363 (1851) 30

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008) ..... *passim*

Glynn v. Roy Al Boat Mgmt. Corp.,
57 F.3d 1495 (9th Cir. 1995) 33

Grimshaw v. Ford Motor Co.,
119 Cal. App. 3d 757 (1981) 26, 27, 31

Guevara v. Maritime Overseas Corp.,
59 F.3d 1496 (5th Cir. 1995)..... 33

McBride v. Estis Well Service, LLC,
768 F.3d 382 (5th Cir. 2014)..... 18

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990)..... 6

Moore v. The Sally J.,
27 F. Supp. 2d 1255 (W.D. Wash. 1998) 34

Spell v. American Oilfield Divers, Inc.,
722 So.2d 399 (La. Ct. App. 1998)..... 34

Sturm, Ruger & Co., Inc. v. Day,
594 P.2d 38 (Alaska 1979)..... 31

Weeks Marine, Inc. v. Bowman,
2006 WL 2178514 (E.D. La. May 23, 2006) 34

Other Authorities

Bureau of Justice Statistics, U.S. Dept. of Justice, Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties, Bureau of Justice Statistics Special Report NCJ 154346 (July 1995)..... 9

Bureau of Justice Statistics, U.S. Dept. of Justice, Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large

Counties, 1996, Bureau of Justice Statistics Bulletin, NCJ 173426 (Sept. 1999) 9

Bureau of Justice Statistics, U.S. Dept. of Justice, Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001, NCJ 202803 (Apr. 2004)..... 10

Bureau of Justice Statistics, U.S. Dept. Of Justice, Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001, NCJ 208445 (Mar. 2005)..... 10

Bureau of Justice Statistics, U.S. Dept. of Justice, Civil Justice Survey of State Courts, 2001: Tort Trials and Verdicts in Large Counties, 2001, NCJ 206240 (Nov. 2004) 10

Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform (1995)..... 10

Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1 (1990) 8, 10

Dan B. Dobbs, Law of Remedies: Damages-Equity-Restitution (2d ed. 1993). 7

Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 Ga. L. Rev. 1049 (2000) 11

Thomas A. Eaton et al., *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. Legal Stud. 343 (2005) 20

Paul S. Edelman, *Guevara v. Maritime Overseas Corp.: Opposing the Decision*, 20 Tul. Mar. L.J. 349 (1996) 33

Gary Edmond & David Mercer, *Trashing "Junk Science"*, 1998 Stan. Tech. L. Rev. 3 (1998) 8

Theodore Eisenberg and Michael Heise, *Judge-Jury Differences in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. of Empirical Legal Stud. 325 (2011) 13

Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 Cornell L. Rev. 743 (2002) 11, 12, 21, 28

Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. of Empirical Legal Stud. 263 (2006) 12

Theodore Eisenberg et al., *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. Legal Analysis 577 (2010) 20

Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623 (1997) 16

Theodore Eisenberg, Michael Heise, and Martin T. Wells, *Variability in Punitive Damages: Empirically Assessing Exxon Shipping Co. v. Baker*, 166 J. of Institutional and Theoretical Econ. 5 (2010) 14

Research Handbook on the Economics of Torts (Jennifer Arlen, ed. 2013) 12, 13

Andrew L. Frey & Evan M. Tager, *Punitive Damages, the Constitution, and Due Process*, Recorder (Sept. 9, 1993) 8

Peter W. Huber, Liability: The Legal Revolution and Its Consequences (1988) 8

Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams, 27 Rev. Litig. 9 (2007) 36

James S. Kakalik et al., Costs and Compensation Paid in Aviation Accident Litigation (1988) 10

Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 Wis. L. Rev. 169 ..... 21, 22, 28, 29

Herbert M. Kritzer & Frances Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring It into View*, 1998 Wis. L. Rev. 157 20

William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987) 11

Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 Law & Contemp. Probs. 43 (1991) 19

Erik Moller, Trends in Civil Jury Verdicts Since 1985 (1996) 10

Mark Peterson, Syam Sarma, & Michael Shanley, Punitive Damages: Empirical Findings (1987) 10

A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998) 35, 36

Neil F. Nazareth and Ian F. Taylor, *Post-Townsend Awards for Failure to Pay Maintenance and Cure: An Overview*, paper delivered at AAJ's 2017 Annual Convention, *available on Westlaw.com at* "2017 Annual AAJ-PAPERS 42." 35

David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Comm. 73 (1997) 17, 31

Restatement (Second) of Torts § 402A 25

Restatement (Second) of Torts § 908 (1979) 24

Michael L. Rustad, *How the Common Good Is Served by the Remedy of Punitive Damages*, 64 Tenn. L. Rev. 793 (1997) 26, 29, 32

Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 Loy. L.A. L. Rev. 1297 (2005) 24, 29

Michael Rustad, *In Defense of Punitive Damages of Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1 (1992) 25, 26, 32

Michael Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L. Rev. 15..... 11

Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 Iowa L. Rev. 957 (2007). 35

Stuart Speiser, Lawsuit (1980)..... 26

U.S. General Accounting Office, *Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-90 (Sept. 1989) 10

Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida:* In Terrorem *and in Reality*, 38 Harv. J. Legis. 487 (2001)..... 11, 19

Neil Vidmar & Mirya Holman, *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts in 2005: A New Audit*, 43 Suffolk U. L. Rev. 855 (2010) 25, 29

INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ["AAJ"] is a voluntary national bar association whose members primarily represent plaintiffs in personal injury cases, as well as employment suits, civil rights actions, and consumer rights cases. AAJ is the world's largest trial bar. Members of AAJ's Admiralty Law Section frequently represent injured seamen and their families.

AAJ believes that the historic role of the admiralty courts in protecting the rights of those who go down to the sea supports the availability of punitive damages to punish owners who willfully disregard their obligation to provide a seaworthy vessel and to deter others from doing so as well.

Owners who recognize the possibility of such awards will invest in providing seafarers with safer places to work.

SUMMARY OF ARGUMENT

1. The Dutra Group and its supporting amici urge this Court to deny the punitive damages remedy in unseaworthiness cases for public policy reasons that this Court has already found wanting. They raise a false specter of increased costs for the U.S. maritime industry that will render it

---

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

uncompetitive with foreign rivals. In essence, they contend that immunity for reprehensible misconduct should be countenanced in the name of commerce.

The fact is that Petitioner's fears of outrageous and unpredictable punitive awards have no basis in fact. They echo the unfounded arguments that have been pressed for decades in a concerted public relations campaign demonizing punitive damages as a threat to the American economy.

Scholars looking into these claims have found them to be built largely on anecdote, imagination, and exaggeration. Nearly four decades of empirical research and actual case data consistently confirm that juries return punitive-damage verdicts infrequently, that the size of punitive damage verdicts has remained remarkably consistent and relatively modest, that jury decisions on punitive damages are very similar to judges' decisions, and that punitive damages are closely related to the compensatory damages, rendering them rationally predictable.

In 2008, this Court had occasion to review that research, which included a multi-year joint project of the U.S. Department of Justice's Bureau of Justice Statistics and the National Center for State Courts, a review of jury verdicts by the General Accounting Office, studies by researchers at the American Bar Foundation, multiple studies by the RAND Institute of Civil Justice, an important work by Professor William Landes and Judge Richard Posner, and rigorous empirical research by university-based scholars.

This Court found that this disinterested scholarship undercut the vocal criticism of punitive damages: Juries have "not mass-produced runaway awards," "the median ratio of punitive to compensatory awards has remained less than 1:1," there has been no "marked increase in the percentage of cases with punitive awards over the past several decades," and jury awards of punitive damages "relate strongly to [the] compensatory award." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497-98 (2008).

Subsequent empirical studies have confirmed these findings. Scholars also addressed this Court's concern regarding the unpredictability of punitive awards, clarifying their analysis to demonstrate that such concerns are not warranted.

2. The further argument advanced by Petitioner and supporting amici – that the mere fear of large, out-of-the-blue punitive damage awards, will have an *in terrorem* effect, pressuring unseaworthiness defendants to expensively settle meritless cases – is likewise baseless.

No persuasive support is offered for this proposition. The cited authorities focus on the special difficulties surrounding class actions or mass tort litigation, or simply fail to support the assertion that routine or unpredictable punitive awards actually exert a "shadow effect" on settlement decisions.

This absence of credible evidence is all the more surprising in view of the fact that maritime law has provided real-world conditions to test Petitioner's theory. First, punitive damages have long been available in general maritime law actions. Secondly, this Court ten years ago held that punitive

damages are available in actions for maintenance and cure. Third, several federal circuits have permitted recovery of punitive damages in unseaworthiness cases for several decades. Neither Petitioner nor supporting amici representing the maritime industry present any evidence that the availability of punitive damages has caused an *in terrorem* effect.

In fact, a number of empirical studies demonstrate that there is no significant "shadow effect" that coerces defendants to settle meritless cases. This Court has itself taken notice of this research. Subsequent analyses of data collected by the Bureau of Justice Statistics and the National Center for State Courts has confirmed this finding. Even the study cited by Petitioner does not establish the purported impact on settlements.

Petitioner's professed fear of random, undeserved punitive verdicts is baseless and rooted in the mistaken notion that plaintiffs can simply ask for punitive damages in a personal injury complaint and hope that the jury will return a generous award irrespective of the merits. In reality, punitive damages may be awarded, even in strict liability actions, only where plaintiff has established willful and wanton, outrageously reprehensible conduct. Moreover, pleading requirements demand that plaintiffs present sufficient evidence of such egregious misconduct before the jury can be asked to consider punitive damages. The experience of punitive damage awards in product liability, such as the Ford Pinto case, demonstrates the substantial burden plaintiffs must meet before reaching the jury.

The asserted fear of large, unpredictable punitive damage award is not supported by either the process of presenting such cases to juries nor the empirical data of jury decisions. Instead, the perceived risk of punitive damages is based on the advocacy of tort reform proponents demonizing punitive damages. It provides no proper policy basis for denying punitive damages in unseaworthiness personal injury cases.

3. The availability of the traditional recovery of punitive damages in cases of a defendant's willful and wanton disregard for its safety obligations is not a threat to the wellbeing of the maritime industry. Rather, it provides a financial incentive for vessel owners to attend to known dangers aboard their vessels.

Punitive damages need not be awarded often to serve this socially beneficial function, and they remove the competitive advantage some may see in requiring seamen to work under dangerous conditions.

The deterrent effect of punitive damages has been demonstrated in product liability, where manufacturers overwhelmingly have responded to punitive damage awards by improving or discontinuing unreasonably dangerous products. Similarly, for many years some employers willfully and unreasonably denied maintenance and cure to injured seamen. Following this Court's decision that punitive damages may be awarded in such cases, practitioners have noted that employers are more willing to meet their obligations to pay valid claims for maintenance and cure.

Nor is there any merit to the argument that punitive damages may overdeter defendants. Such an argument makes no more sense than claiming that fines for reckless driving will overdeter careful driving. Punitive damages aim to punish and deter outrageous and reprehensible misconduct. There can be no overdeterrence of conduct that has no societal benefit.

ARGUMENT

I. Petitioner Greatly Exaggerates the Adverse Impact Punitive Damages in Personal Injury Actions Has on the Maritime Industry and the American Economy Generally.

Aside from the revisionist history it relates about the availability of punitive damages under maritime law,[2] the Dutra Group and its supporting

---

[2] This Court described the long history of punitive damages' availability for maritime claims and the place of maintenance and cure within it in *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 410-15 (2009). This Court held that "[h]istorically, punitive damages have been available and awarded in general maritime actions." *Id.* at 407. The Dutra Group attempts to set aside that history by claiming an independent history for seaworthiness claims that does not overlap or draw from the history it concedes that allows punitive damages for maintenance and cure. Petitioner's Brief ("Pet. Br.") 22. Yet, unseaworthiness claims are general maritime actions that predate the Jones Act, *Townsend*, 557 U.S. at 419, and were left undisturbed, along with other maritime claims, by the enactment of the Jones Act as a separate remedy that may be pursued. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990).

amici advance a public policy rationale for denying punitive damages in unseaworthiness cases that this Court has already found wanting. They raise a false specter of increased costs for the maritime industry that will end up rendering the U.S. maritime industry uncompetitive as compared with foreign rivals who do not operate under a civil justice system as equally protective of the safety of seagoing employees as ours. The essence of that assertion, framed differently, is that permitting punitive damages for egregious misconduct would put them at a competitive disadvantage in maritime commerce, as though reprehensibility should be countenanced in the name of commerce.[3]

The rhetorical arguments The Dutra Group and its amici muster amount to little more than an exaggerated and unwarranted fear of punitive damages that is no different from allowing a heckler to veto the exercise of free speech as a reason to limit First Amendment freedoms. These fears, however, are baseless. Neither the incidence of actual punitive damage awards nor their purported "shadow effect" on personal injury settlements provides any sound policy basis for immunizing vessel owners from punitive damages where their egregious misconduct has caused injury. Indeed, such immunity undermines the financial incentive for safety.

---

[3] Punitive damages are generally available only in cases of intentional torts involving malice or substantial recklessness. *See* Dan B. Dobbs, Law of Remedies: Damages-Equity-Restitution 310-33 (2d ed. 1993).

A. *Punitive Damage Awards Are Relatively Infrequent, Moderate in Amount, and Rationally Predictable, as this Court Has Recognized.*

History, we are often reminded, repeats itself – and the public policy arguments assayed by Petitioner and its amici attempt to support their advocacy with arguments and assertions this Court has examined and rejected. The arguments have their basis in a concerted public relations campaign begun decades ago with the aim of curbing punitive damages.[4] Eventually, members of this Court took note of the claims and began to worry that frequent "skyrocketing" punitive damage awards plagued the civil justice system and resulted in an adverse impact on the economy, commerce, and product innovation. *See, e.g., Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting).[5] The arguments made then are the

---

[4] *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 14-16 (1990) (describing press kits and other public relations tools using purposely fractured versions of horror stories and anecdotes about jury verdicts involving punitive damages, as well as the misuse of aggregate data on the frequency and size of awards to change attitudes); Andrew L. Frey & Evan M. Tager, *Punitive Damages, the Constitution, and Due Process*, Recorder (Sept. 9, 1993) (utilizing those materials to make a case for judicial intervention).

[5] This dissent relied, in part, on a book for its concern that manufacturers abandoned new products out of fear of punitive damages. 492 U.S. at 282 (citing Peter W. Huber, Liability: The Legal Revolution and Its Consequences 152-71 (1988)). The book was later described as "polemical," rather than based in fact. *See* Gary Edmond & David Mercer, *Trashing "Junk Science"*, 1998 Stan. Tech. L. Rev. 3, 4 (1998) (describing Huber's contributions to the literature as "polemical works").

same ones The Dutra Group and its amici put forth today, relying on many of the same articles that fueled the earlier campaign, to claim that the mere availability of punitive damages will have "adverse consequences . . . for maritime commerce, the environment, and national security." Pet. Br. 34.

However, scholars understood that the effort to portray an outsized punitive-damage problem was built largely on imagination and ignored the best available empirical research. In fact, there is now nearly four decades of consistent research confirming that juries return punitive-damage verdicts infrequently, that the size of punitive damage verdicts has remained remarkably consistent and relatively modest, and that judges decide punitive damages using similar criteria and consistently with jury assessments, rendering them rationally predictable.

B. This Court Has Found Criticism of Punitive Damages, Like Those Set Forth by Petitioner, Undercut by Empirical Studies.

By 2008, when this Court had occasion to examine that literature, the body of research rebutting claims of a punitive-damage problem included a multi-year joint project of the U.S. Department of Justice's Bureau of Justice Statistics and the National Center for State Courts,[6] a review of jury

---

[6] Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties*, Bureau of Justice Statistics Special Report NCJ 154346 (July 1995); Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties, 1996*, Bureau of Justice Statistics Bulletin, NCJ 173426 (Sept. 1999); Bureau

verdicts by the General Accounting Office,[7] studies by researchers at the American Bar Foundation,[8] multiple studies by the RAND Institute of Civil Justice,[9] an important work by Professor William

---

of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001*, NCJ 202803 (Apr. 2004); Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Tort Trials and Verdicts in Large Counties, 2001*, NCJ 206240 (Nov. 2004); Bureau of Justice Statistics, U.S. Dept. Of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001*, NCJ 208445 (Mar. 2005).

[7] U.S. General Accounting Office, *Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-90, at 24, 29 (Sept. 1989) (Punitive damages were awarded in 23 of 305 cases decided in five states.).

[8] Stephen Daniels & Joanne Martin, *Civil Juries and the Politics of Reform* 214 (1995) ("[P]unitive damage award activity suggests . . . the need for . . . skepticism with regard to claims about the increasing frequency of such awards."); Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1 (1990).

[9] James S. Kakalik et al., *Costs and Compensation Paid in Aviation Accident Litigation* 27 (1988) ("[P]unitive damages were not paid on any of the 2,198 closed cases."); Erik Moller, *Trends in Civil Jury Verdicts Since 1985*, 33 (1996) ("[P]unitive damages are awarded very rarely."); Mark Peterson, Syam Sarma, & Michael Shanley, *Punitive Damages: Empirical Findings* 10 (1987) (Fewer than seven punitive damages awards per year in Cook County and fewer than six in San Francisco from 1960-1984.).

Landes and Judge Richard Posner,[10] and rigorous empirical research by university-based scholars.[11]

Based on that disinterested scholarship, this Court recognized that the frequent "audible criticism [of punitive damages] in recent decades" was undercut by "the most recent studies." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497 (2008). In fact, this Court concluded, after reviewing a "survey of the literature," "that discretion to award punitive damages has not mass-produced runaway awards," that "the median ratio of punitive to compensatory awards has remained less than 1:1," and that there was no "marked increase in the percentage of cases with punitive awards over the past several decades." *Id.* at 497-98. As one set of researchers this Court cited repeatedly stated, "[m]isperceptions about juries and punitive damages are especially strong." Eisenberg, 87 Cornell L. Rev. at 745. In contrast to the claims propagated by opponents of punitive

---

[10] William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, 304-07 (1987) ("[The] insignificance of punitive damages in our sample is evidence that they are not being routinely awarded.").

[11] *See, e.g.*, Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 Cornell L. Rev. 743, 745 (2002); Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 Ga. L. Rev. 1049, 1094 (2000) ("punitive damages currently are not a significant factor in personal injury litigation in Georgia."); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 Harv. J. Legis. 487, 487 (2001) (finding punitive damages in Florida to be "strikingly low."); Michael Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L. Rev. 15, 17-19.

damages, "juries rarely award such damages, and . . . tend to award them in intentional misconduct cases. When juries do award punitive damages, they do so in ways that relate strongly to compensatory award." *Id.* Based on the empirical literature, this Court concluded that the studies demonstrate "overall restraint" in the assessment of punitive damages. *Baker*, 554 U.S. at 499. Interestingly, using the same data sets, researchers found no significant difference in punitive damage assessments made by judges from those made by juries. Eisenberg, 87 Cornell L. Rev. at 763. *See also* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. of Empirical Legal Stud. 263 (2006).

C. More Recent Studies Also Undermine Criticism of Punitive Damages.

Neither The Dutra Group nor its amici muster any post-*Baker* studies that might indicate a new and different trend from that established by the empirical literature this Court studied in *Baker*. Although new studies are sparse, the ones that exist confirm the conclusions of older ones: that punitive damages are not "out of control" or "in need of reform." Theodore Eisenberg, *The Empirical Effects of Tort Reform*, *in* Research Handbook on the Economics of Torts 543 (Jennifer Arlen, ed. 2013) [hereinafter "Research Handbook"]. That more recent literature also demonstrates that punitive damage assessments strongly track compensatory awards, indicating they remain "reasonably sober [and] modest in size." Theodore Eisenberg and Michael Heise,

Judge-Jury Differences in Punitive Damages Awards: Who Listens to the Supreme Court?, 8 J. of Empirical Legal Stud. 325, 325, 335 (2011). Moreover, the size of punitive damage awards "remain relatively stable over time." *Id.* at 325, 339.[12] Indeed, as Professor Sharkey writes, it is not debatable that "punitive damages are awarded infrequently." Catherine M. Sharkey, *Economic Analysis of Punitive Damages: Theory, Empirics, and Doctrine*, *in* Research Handbook, at 500. The data continues to show few awards of greater than $1 million, while nearly 60 percent of all punitive damages awarded were less than $100,000. Eisenberg & Heise, 8 J. of Empirical Legal Stud. at 334.

The one concern about punitive damages, or "real problem," that this Court expressed in *Baker* was the "stark unpredictability of punitive awards." 554 U.S. at 499. The same researchers that this Court relied upon in *Baker* for its understanding of the literature undertook to examine that question, using the same data that generated the concern. They found that the "mean and standard deviation relied on by the Court do not support its concern about unpredictability," partially because the Court relied on statistical summaries that did not account

---

[12] This study did find a modicum of differences in the newest data between judge and jury assessments of punitive damages in particular kinds of cases, which was not evident in previous datasets. The study found that judges awarded punitive damages at a slightly higher rate in personal injury cases, while juries somewhat more frequently awarded them in nonpersonal injury cases. *Id.* at 352, 348. The authors attributed the variations detected largely to "[s]ystematic differences in the streams of cases that wind up in front of judges and juries. *Id.* at 328.

for the seriousness of the injury and thus the size of the compensatory damages. Theodore Eisenberg, Michael Heise, and Martin T. Wells, *Variability in Punitive Damages: Empirically Assessing Exxon Shipping Co. v. Baker*, 166 J. of Institutional and Theoretical Econ. 5, 18 (2010). Thus, the different awards in otherwise similar cases were entirely explicable by the low or high compensatory awards given for starkly different injuries. *Id.* at 20. Instead, this study, as well as the bulk of scholarly work, points to consistency in the award of punitive damages. *Id.* at 21.

Simply put, the "audible criticism" of punitive damages that The Dutra Group and its amici dredge up from the past was found wanting by this Court before and nothing new warrants reexamination of that finding today. *See Baker*, 554 U.S. at 497.

II. The Purported "Shadow Effect" of Punitive Damages Has No Basis in Reality.

A. Petitioner and Supporting Amici Rely on Unsupported Assertions that Fear of Unpredictable and Large Punitive Damage Verdicts Forces Defendants to Settle Meritless Cases.

The Dutra Group largely ignores the mountain of empirical data establishing that punitive damage verdicts are rare, modest in amount, and closely corelated with the compensatory damages awarded. Yet, Petitioner advances the argument that defendants' fear of large, out-of-the-blue punitive damage awards, will "have an *in terrorem* effect

on unseaworthiness defendants, pressuring them to settle weaker cases or to settle for more money than they otherwise would." Pet. Br. 35. These settlements, it is asserted, will increase costs for consumers, harm the maritime industry, and perhaps even undermine the nation's military readiness. Pet. Br. 38-39.

Petitioner's supporting amici echo these contentions. *See. e.g.*, At-Sea Processors Ass'n Br. 7 ("The predictable effect of making punitive damages available . . . will be to coerce maritime defendants into settling even dubious unseaworthiness claims," leading to higher prices for consumers.); Dredging Contractors Br. 19 ("[A]llowing punitive damages to attach to an unseaworthiness claim would substantially increase the costs to shipowners through higher damage awards [and] higher settlements."); American Maritime Ass'n Br. 10 ("Forcing these companies to pay (or to be threatened with) punitive damages could cripple the industry and, by extension, the national defense.").

The Dutra Group and supporting amici offer no factual support for either their unwarranted fear of large and unpredictable punitive damage awards or for the notion that defendants routinely settle meritless cases to avoid such awards. The authorities cited by Petitioner focus on the pressures defendants face in large class actions and mass torts. *See* Pet. Br. 35 n.12 (citing, for example, James Henderson, *The Impropriety of Punitive Damages in Mass Torts*, 52 Ga. L. Rev. 719 (2018)). *See also* U.S. Chamber of Commerce Br. 10 (citing several of the same sources). The issues presented by class actions and mass tort litigation have little bearing on an

individual injured seaman's personal injury lawsuit arising out a vessel's unseaworthiness.

The U.S. Chamber cites Professor Eisenberg and his co-authors for the proposition that perhaps "thousands of cases" settle on different terms "because of the possibility of punitive damages." *Id.* at 11 (citing Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623, 625 (1997). *See also* At-Sea Processors Ass'n Br. 5 (quoting the same passage). In the cited Eisenberg text, the researchers were not reporting the results of their empirical study. They were describing an area that they did *not* study, but which they believe merits separate inquiry. 26 J. Legal Stud. at 625. Their analysis did find that punitive damages awards in nonintentional personal injury cases are "very rare." *Id.* at 637, 645. Most importantly, the researchers' found that the amount of punitive damages awarded in a particular case is closely corelated to the amount of compensatory damages and thus highly predictable. *Id.* at 651. Settlements, they suggest, "should reflect what juries have done in prior cases." *Id.* at 625. The study thus provides no support for the proposition that routine, unpredictable punitive damage awards exert a "shadow effect" on settlements.

Moreover, this Court in *Baker* examined the available relevant empirical studies and concluded that "data have not established a clear correlation." 554 U.S. at 498 n.15.

B. There Is No Evidence that Defendants Routinely Settle Meritless Cases Out of Fear that a Jury May Award Punitive Damages.

Petitioner's failure to provide any empirical data demonstrating that fear of random large punitive awards actually causes defendants to settle meritless cases is all the more striking in the area of general maritime law. Changes in the law provide real-world conditions to test Petitioner's theory.

As this Court has observed, punitive damages have long "been available and awarded in general maritime actions." *Townsend*, 557 U.S. at 407. Indeed, even prior to enactment of the Jones Act in 1920 "maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen." *Id.* at 412 (quoting David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Comm. 73, 115 (1997)). Yet, The Dutra Group and supporting amici, who would have direct access to information regarding the impact punitive damage claims on settlements, offer no such information to this Court.

A second area of inquiry into the existence of a "shadow effect" is the pattern of settlements following this Court's decision in *Townsend* that punitive damages are recoverable in appropriate cases of wrongful denial of maintenance and cure. Petitioner provides no indication of an impact on pretrial settlements of such claims. In fact, one supporting amicus concedes that "grave consequences have not

followed from this Court's decision." At-Sea Processors Ass'n Br. 7 n.6.

Thirdly, The Dutra Group could look to the jurisdictions that have held that punitive damages may be recovered in unseaworthiness cases. *See* Pet. Br. 32 n.9 (citing *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981);[13] and *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972)). Petitioner provides no evidence that during the time maritime defendants in those jurisdictions faced possible punitive damage awards in unseaworthiness cases, they settled weak cases for larger amounts compared to similar cases in jurisdictions which deny punitive damages.

Certainly, if the availability of punitive damages in these areas of general maritime law created an "in terrorem" effect that would warrant rejection of the punitive damages remedy, Petitioner and its supporting amici representing the maritime industry would have highlighted the evidence for this Court.

C. Empirical Studies Show There Is No Significant "Shadow Effect."

Not only has Petitioner failed to provide any evidence that punitive damages cast a "shadow effect" that distorts case settlements, existing

---

[13] The Fifth Circuit reversed its position in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (en banc).

empirical data indicates quite the opposite. For example, a study of case outcomes in Florida concluded,

> [D]espite frequent claims by tort reform proponents in Florida, and around the country, that punitive damages claims and punitive damages awards produce an *in terrorem* effect on corporate defendants, there is no systematically documented evidence that this is so. Indeed, there is evidence that such predicted effects are minimal or nonexistent.

Vidmar & Rose, 38 Harv. J. Legis. at 511.

Similarly, a review of all medical malpractice cases filed in North Carolina in 1984-87 inquired whether "juries regularly and unjustifiably award punitive damages" and whether "the mere assertion of a punitive damages claim coerces insurers into 'in terrorem' settlements." Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 Law & Contemp. Probs. 43, 72 (1991). "The observed results from the study suggest that neither of these assertions is valid." *Id.*

This Court itself took note of research into assertions that settlements are "driven" by the threat of punitive damages. *See Baker*, 554 U.S. at 499 n.15. One study cited by the Court determined that the research purporting to support this claim actually did "not show what, if any, impact such claims had on either the ultimate settlement or the costs of handling the case." Herbert M. Kritzer & Frances

Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring It into View*, 1998 Wis. L. Rev. 157, 160-61. They concluded that existing evidence "does not support the notion that the threat of punitive damages casts a large shadow." *Id.* at 160.

A more recent empirical study, also relied on by this Court in *Baker*, examined more than 25,000 tort cases filed in Georgia state courts between 1994 and 1997. Thomas A. Eaton et al., *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. Legal Stud. 343, 349 (2005). The study's findings were "inconsistent with [the] hypothesis that the threat of punitive damages will coerce more settlements. In fact, our data tend to suggest just the opposite." *Id.* at 366. In this Court's view, as well, "the data have not established" that such an impact on settlements exists. *Baker*, 554 U.S. at 499 n.15.

Two years after *Baker*, researchers analyzing Bureau of Justice Statistics case data found, consistent with prior empirical research, "little evidence of a settlement effect." Theodore Eisenberg et al., *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. Legal Analysis 577, 615 (2010).

Another team of researchers led by Professor Eisenberg studied a large database of case outcomes assembled by the National Center for State Courts, taken from courts in 45 counties. They hypothesized that if the threat of large punitive damage awards actually pressured defendants into settling weak cases, defendants would be more likely to take such cases to trial in states that have imposed caps limiting defendants' exposure to large punitive damage

awards. In fact, the data revealed no difference in settlement rates in states with limits compared to states where punitive damages were not limited. Eisenberg, 87 Cornell L. Rev. at 770. The authors concluded that this result agrees with previous studies that found no support for the "hypothesis that settlements [are] shaped by punitive damages." *Id.* at 768.

Even the single empirical study cited by The Dutra Group does not support their position. *See* Pet. Br. 36 n.12 (quoting Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 Wis. L. Rev. 169, 172, 176-177 & n.25 for the proposition that "the perceived risk of large and unpredictable punitive damages awards 'plays a significant role in driving settlements.'"). Closer examination demonstrates that Professor Koenig's study does not support this proposition at all.

At the outset, it should be noted that the statement in question was based on the opinions expressed by attorneys involved in settlements, not on actual settlement outcomes. Professor Koenig also examined previous studies conducted in Florida, California, and Alabama and found that none showed that punitive damages exerted any impact on the settlement process or were used to extort higher settlement offers. Koenig, 1998 Wis. L. Rev. 178-81.

Because settlements are almost always negotiated by liability insurers, Professor Koenig viewed a closed claim study by the Texas Department of Insurance as offering valuable insight. Claims adjusters were required to assess the impact that a claim

for punitive damages had on the insurer's ultimate decision to pay the liability claim. Across small, medium and large claims for bodily injury, adjusters reported that only a percentage of claims was at all affected by the presence of a claim for punitive damages. For claims under $10,000, punitive damage claims were estimated to have increased the settlement payout by about 14 percent, while settlements over $200,000 were increased by only 4.8 percent. *Id.* at 189-94.

A closed claim study conducted by the Insurance Services Office involving liability claims of over $25,000 for bodily injury included data from 27 states. The results were similar to the Texas study. In cases where punitive damages were claimed, "the 'shadow effect' of punitive damages was reported to be 8%. Across all claims, the effect was measured at slightly more than 1% in the opinion of claims adjusters." *Id.* at 201.

In sum, nothing in Professor Koenig's work supports Petitioner's notion that a claim for punitive damages exerts any pressure on defendants to settle cases that have no merit. Settlements were reached in cases deemed to be meritorious, with only a slightly larger payout where punitive damages were sought. As summarized by Professor Koenig, "[p]unitive damages may be claimed, but adjusters dismiss their significance. The proof is in the payouts." *Id.* at 208.

Clearly, the great fear of unpredictable and unpredictably large punitive awards professed by Petitioner and supporting amici is baseless. Its purported "shadow effect" causing defendants to enter

into expensive settlements of meritless lawsuits does not exist and should not be the basis for denying the remedy of punitive damages in maritime unseaworthiness cases.

D. Petitioner's Purported "Shadow Effect" Is Grounded in a Myth that Punitive Damage Claims Are Easily and Routinely Presented to Juries.

1. Trial courts require plaintiffs to present evidence of defendants' willful and wanton misconduct to seek punitive damages.

Much of The Dutra Group's professed fear of random, undeserved punitive verdicts is rooted in the mistaken notion that plaintiffs can simply add a count for punitive damages to any personal injury complaint in hopes that the jury will favor them with a generous award irrespective of the merits. Petitioner compounds this error by conflating the strict liability unseaworthiness cause of action with the punitive damages claim. *See* Pet. Br. 35 ("Because unseaworthiness is a strict-liability regime, in which fault need not be proved, it is comparatively easy for a plaintiff to survive dispositive pretrial motions and then prevail at trial. The threat of punitive damages will therefore have an *in terrorem* effect on unseaworthiness defendants.").

Petitioner's supporting amici echo this mistaken view. *See, e.g.*, American Waterways Operators Br. 22 (A claim of unseaworthiness, which "does not require proof of knowledge or fault on the part of

the vessel owner" can be coupled with "mere assertion of a claim for punitive damages, even if meritless." In addition, vessel owners will face "a claim for punitive damages in nearly every seaman's personal injury case."); American Maritime Ass'n Br. 4 (Affirmance would "permit punitive damages where a minimal showing of unseaworthiness results in absolute liability regardless of fault."); Greater New Orleans Barge Fleeting Ass'n Br. 18 (If allowed in unseaworthiness actions, "every seaman will bring a claim against a vessel owner for punitive damages . . . regardless of whether the vessel owner acted in a wanton or reckless manner"); Inland River Harbor Br. 27 ("[C]laims seeking punitive damages for unseaworthiness will become boilerplate in seamen's complaints."); U.S. Chamber Br. at 13 (Under the decision below "substantial punitive damages can now result from the generic common-law duty to provide a seaworthy vessel.").

To the contrary, "[n]o jurisdiction permits punitive damages to be awarded for mere negligence," much less strict liability. Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 Loy. L.A. L. Rev. 1297, 1304 (2005). Punitive damages may be awarded only where the evidence shows that defendant's conduct was "outrageous," Restatement (Second) of Torts § 908 (1979), showing willful, wanton and reckless indifference to the rights of others, "or behavior even more deplorable." *Baker*, 554 U.S. at 493.

Importantly, pleading requirements "screen out marginal claims and prevent extortionate claims," prior to trial. Rustad, 38 Loy. L.A. L. Rev. at 1313-14. "In most jurisdictions, the plaintiff must

demonstrate willful, wanton, or malicious behavior, and judges appear to be exercising their statutory or common law discretion in pre-trial proceedings." Neil Vidmar & Mirya Holman, *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts in 2005: A New Audit*, 43 Suffolk U. L. Rev. 855, 867 (2010). In fact, "judicial gate-keeping prevents many routine claims from ever being put to the jury in the first place, as judges apply the common law and statutes to eliminate inappropriate claims. *Id.* at 879.

A review of punitive damages awarded in products liability suits illustrates that the foundation of The Dutra Group's purported shadow effect – the ease of presenting requests for punitive damages to juries – is baseless. A product manufacturer may be strictly liable for injury caused by a defective product, regardless of fault. *See* Restatement (Second) of Torts § 402A. However, before the jury may be asked to award punitive damages, plaintiff must introduce sufficient proof that the defendant marketed its product knowingly or in conscious disregard for the purchaser's safety.

Professor Rustad, in his study of punitive damage verdicts in product liability cases, observed that "[c]ontrary to the fears of the business community, plaintiffs have a substantial burden before the issue can be submitted to the fact-finder. Michael Rustad, *In Defense of Punitive Damages of Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 65 (1992) [hereinafter "*In Defense of Punitive Damages*"]. Generally, evidence of the defendant's "knowledge of a defect and subsequent disregard is a precondition for a punitive

award." *Id.* at 73. Overwhelmingly, "the companies were punished when plaintiffs proved that companies . . . knew of a developing or known risk of danger and failed to take available safety steps to avoid the danger." *Id.* In fact, the most common predictor that the jury may award punitive damages is the introduction of "smoking gun" evidence that the company was well aware that the product was highly dangerous, but covered up the danger in an effort to maximize profits. Several examples are described in Michael L. Rustad, *How the Common Good Is Served by the Remedy of Punitive Damages*, 64 Tenn. L. Rev. 793, 818-39 (1997) [hereinafter "Rustad, *How the Common Good Is Served*"].

One well-known example is the case of the Ford's popular subcompact car marketed in the 1970s, the Pinto. Internal Ford memos revealed that, even before the first Pinto was offered for sale, the company knew that the fuel system presented a severe risk of fuel-fed fires, particularly when the car rolled over or was rear-ended. Documents show that Ford anticipated that 180 people would be burned to death and another 180 severely injured by fuel-fed fires. The hazard could have been minimized or eliminated with changes costing less than $16 per car. Ford management nevertheless determined that it was more profitable to pay compensatory damages than to make the car safer. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 774-78 & 813 (1981). *See also* Stuart Speiser, Lawsuit 355-63 (1980) (detailing the documentary evidence in the case). The court of appeal, while upholding Ford's liability for punitive damages, also upheld the trial

court's reduction of the amount from $125 million to $3.5 million. *Grimshaw*, 119 Cal. App. at 822-23.

In the maritime context, "punitive damages have long been an accepted remedy under general maritime law." *Townsend*, 557 U.S. at 424. Although vessel owners may be strictly liable for failure to pay maintenance and cure, this Court held that punitive damages "for the *willful and wanton disregard* of the maintenance and cure obligation should remain available in the appropriate case." *Id.* (emphasis added).

As in the product liability context, an injured seaman cannot ask a jury to award punitive damages unless plaintiff has demonstrated not only that the vessel was unseaworthy, but additionally that the vessel owner willfully and wantonly exposed the seaman to the danger. The argument that seamen will simply add a request for punitive damages to every unseaworthiness complaint – and that vessel owners will settle out of fear that a jury will issue an arbitrary and unsupported punitive damage award – has no basis in fact.

2. Professed fear of arbitrary and outrageous punitive damage awards is not based on fact, but on advocacy, providing no sound policy for denying the punitive damages remedy.

What might give rise to this fear of unpredictable, out-of-control punitive damages, unsupported

by empirical data or by the procedural realities of personal injury practice? Petitioner relies on Professor Koenig's inquiry into this effect for the proposition that "the *perceived* risk of large and unpredictable punitive damages awards 'plays a significant role in driving settlements.'" Pet. Br. 36 n.12 (emphasis added) (quoting Koenig, 1998 Wis. L. Rev. at 172, 176-177 & n.25). This "perceived" risk, as previously discussed has no factual support and is not "based on the observed pattern of judge and jury trial outcomes." Eisenberg, 87 Cornell L. Rev. at 768. Instead, the shadow effect "may be based on misperception." *Id.*

The context of Professor Koenig's remark is illuminating:

> My thesis is that even though the empirical research consistently shows that punitive damages are rare and well-controlled by the judiciary, this remedy plays a significant role in driving settlements. The empirical evidence suggests that the business community's fear of runaway punitive damages is exaggerated. . . . A belief that punitive damages are "out of control" and randomly assessed may create a self-fulfilling prophesy as parties negotiate claims according to their perceptions of the populist behavior of juries. Anecdote, hyperbole and simple confusion may shape settlements in a more powerful way than empirical truths.

Koenig, 1998 Wis. L. Rev. at 172.

As Professor Rustad has pointed out, the business community's exaggerated fear of punitive damages is the consequence an organized advocacy effort by advocates of tort reform, largely funded by major corporations. Rustad, *How the Common Good Is Served*, 64 Tenn. L. Rev. at 795 (1997). *See also* Vidmar & Holman, 43 Suffolk U. L. Rev. at 856. Advocates targeting the availability of punitive damages imaginatively, but wrongfully, "portray [it] as the unpredictable nine-hundred-pound gorilla of our civil justice system ever ready to wreak havoc on corporate America." Rustad, 38 Loy. L.A. L. Rev. at 1297.

To create a fear of punitive damages that demands political and judicial action, punitive damages are demonized so that businesses believe "that punitive damages come out of the blue, striking like lightning." Rustad, 64 Tenn. L. Rev. at 844. Unhappily, creating this myth has "unintended, negative consequences." *Id.* at 795. The business community persuaded to invest substantial resources in changing tort law, rather than investing in safety that would preclude tort liability. *Id.*

Certainly, the mere possibility that vessel owners might believe – and base settlement decisions on – such myth and misperception cannot serve as a sound basis for this Court's decision.

III. The Availability of Punitive Damages Provides Financial Incentive for Vessel Owners to Avoid Exposing Seamen to Known Dangerous Conditions, Resulting in Greater Safety and Benefiting the Maritime Industry.

A. The Availability of Punitive Damages Effectively and Efficiently Protects the Public From Egregious, Socially Harmful Misconduct.

1. The threat of punitive damages provides an efficient financial incentive for safety.

Punitive damages is "a well-established principle of the common law . . . [in] all actions on the case for torts," allowing juries and judges to identify certain unlawful misconduct as particularly worthy of condemnation. *Day v. Woodworth*, 54 U.S. 363, 371 (1851); *Barry v. Edmunds*, 116 U.S. 550, 562 (1886). The modern-day consensus is that the purpose of punitive damages is "retribution and deterring harmful conduct." *Baker*, 554 U.S. at 492.

The Dutra Group and its supporting amici argue that immunity from punitive damages is essential to the long-term health of the maritime industry. In fact, just the opposite is true. Judge Guido Calabresi, who was one of the earliest scholars to apply economic theory to tort law, has explained that, in some categories of cases, an award of compensatory damages, standing alone, will "result in systematic underassessment of costs, and hence in systematic underdeterrence" of misconduct. *Ciraolo v. City of*

New York, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring), *cert. denied*, 531 U.S. 993 (2000). The availability of "[p]unitive damages can ensure that a wrongdoer bears all the costs of its actions, and is thus appropriately deterred from causing harm." *Id.* The rationale for punitive damages, as the California court in the Ford Pinto case, a commercial enterprise "may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the [dangerous] defect." *Grimshaw*, 119 Cal. App. at 382. Indeed, willfully disregarding safety can give that company "an unfair advantage over its more socially responsible competitors." *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 47 (Alaska 1979). To keep pace, those competitors may feel compelled to disregard safety, leading to a "race to the bottom" in terms of preventing harm to workers, consumers, or the general public. Surely, it cannot be argued that the maritime industry cannot survive unless it ignores the safety of its seamen.

Punitive damages are an efficient means to deterring misconduct. As Professor Robertson has noted "[i]f the threat is well-designed, such damages should not have to be actually awarded very often. We want the threat to *work*." Robertson, 28 J. Mar. L. & Com. at 162-63 (emphasis original). In fact, as demonstrated by the product liability experience, punitive damages, even if rarely awarded, serve as financial incentive to deter willful disregard for safety.

2. The availability of punitive damages has resulted in enhanced product safety.

As previously noted, punitive damages are rarely awarded in product liability cases; 355 such awards could be found between 1965 and 1990. Rustad, 78 Iowa L. Rev. at 30. Professor Rustad's follow-up research on those awards determined that:

> Punitive damages played a vital social policy role in discouraging firms from marketing dangerous products or failing to recall them. The vast majority of dangerous products have been recalled, modified, and redesigned by their manufacturers. Of the cases studied, as many as eighty-two percent of the defendants took some safety step to remedy the dangerous situation.

Id. at 79.

One clear example can be seen in the actions of Ford after the Pinto issue. In light of the case, Ford "underwent a complete management change." Rustad, 64 Tenn. L. Rev. at 843. In 1980, Ford's new president "implemented directives about designing safety features," and two years later "implemented significant improvements in fuel system integrity." *Id.* at 844.

3. The availability of punitive damages has reduced wrongful denial of maintenance and cure.

Also instructive are developments following this Court's decision in *Townsend*, recognizing the availability of punitive damages in appropriate cases of wrongful denial of maintenance and cure. Like unseaworthiness, violation of the obligation to provide maintenance and cure is a strict liability cause of action. However, as one practitioner noted,

> [S]ome employers willfully withhold these payments as a method to force settlements at an early stage. Crewmembers generally have few resources to sustain themselves adequately after an injury, or to pay for proper medical attention and therapy. Unless the courts place a significant price on the actions of these employers, the crewmembers will continue to be victimized.

Paul S. Edelman, *Guevara v. Maritime Overseas Corp.: Opposing the Decision*, 20 Tul. Mar. L.J. 349, 357 (1996).

For fourteen years prior to this Court's *Townsend* decision, seamen in both the Fifth and the Ninth Circuits could not recover punitive damages for willful or wanton denial of maintenance and cure. *See Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995); *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995). Some employers during that time willfully denied proper claims by seamen. *See, e.g., Weeks Marine, Inc. v.*

Bowman, 2006 WL 2178514, at * 2 (E.D. La. May 23, 2006) (deploring defendant's "consistently unreasonable and recalcitrant conduct" in refusing to pay for its seaman's surgery); *Moore v. The Sally J.*, 27 F. Supp. 2d 1255, 1261 (W.D. Wash. 1998) (defendant's refusal was "willful and persistent"); *Charpentier v. Blue Streak Offshore, Inc.*, 1997 WL 426093, at *5-6, 9 (E.D. La. July 29, 1997) (detailing defendant's "callous" mistreatment of seaman); *Spell v. American Oilfield Divers, Inc.*, 722 So.2d 399, 405 (La. Ct. App. 1998) (defendant's handling of the maintenance and cure claim was "recalcitrant" and "egregious").

A further example is *Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827 (Wash. 2012), *cert. denied*, 568 U.S. 823 (2012). Seaman Clausen was injured in 2006. The vessel owner persistently delayed or denied payment for medical treatment, intentionally disregarding Clausen's health, and paid only $20 per day in maintenance, knowing Clausen was "practically homeless." *Clausen*, 272 P.3d at 835. Defendant's purpose was to pressure Clausen "to take the 'bait' and settle early without legal representation." *Id.* In addition, the company "deliberately made false statements" to the federal court in an effort to terminate maintenance and cure. *Id.* at 835-36. The Washington Supreme Court concluded that punitive damages were warranted to deter owners from such "reprehensible" and "egregious" unlawful conduct. *Id.* at 836.

Following *Townsend*, however, attorneys representing seamen observed that "employers are paying maintenance and cure, sometimes 'under protest' and often begrudgingly, but the tide has turned to helping injured seamen at least get by with

maintenance and cure." Neil F. Nazareth and Ian F. Taylor, *Post-Townsend Awards for Failure to Pay Maintenance and Cure: An Overview*, paper delivered at AAJ's 2017 Annual Convention, *available on Westlaw.com at* "2017 Annual AAJ-PAPERS 42."

As one scholar has observed, "The question is not, do punitive damages have a deterrent effect? The answer to that question is that of course they almost certainly do." Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 Iowa L. Rev. 957, 983 (2007).

B. Punitive Damage Awards Do Not Result in Overdeterrence of Socially Beneficial Conduct.

The Dutra Group does not dispute that punitive damages deter misconduct. Rather, Petitioner claims that the mere possibility of punitive awards will *overdeter*, causing corporate defendants to "take socially wasteful precautions or decline to engage in socially valuable commercial activity altogether." Pet. Br. 34 (citing A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882-883 & n.29 (1998)). This is a surprising assertion – akin to claiming that instituting a fine for reckless driving will cause people and companies to discontinue driving altogether. Petitioner offers not a single example in support. Professors Polinsky and Shavell, in the passage cited by Petitioner and the authorities in the cited footnote, focus entirely on product liability damages in mass tort cases involving pharmaceuticals and vaccines. Those authors do not contend that punitive damages themselves have discouraged worthwhile activity.

More fundamentally, Professors Polinsky and Shavell contend that punitive damages *should* be available, but that the amount awarded should reflect the likelihood that the defendant might escape compensatory liability. Polinsky & Shavell, 111 Harv. L. Rev. at 954. They contend that "the reprehensibility of a party's conduct generally should not be a factor in the assessment of punitive damages." *Id.* This Court, however, has firmly stated that the reprehensibility of the defendant's misconduct is perhaps "the most important indicium of the reasonableness of a punitive damages award." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). It is "particularly reprehensible" conduct that punitive damages deter. *Id.* at 576. There can be no overdeterrence of an egregiously reprehensible act. *See* Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams, 27 Rev. Litig. 9, 20 (2007) (where "the offender's conduct offers no social benefit whatsoever, there is no cost associated with over-deterrence.").

The Ninth Circuit did not hold that an owner who puts its vessel out to sea with an unknown unseaworthy condition aboard will face an award of punitive damages. Rather, the vessel owner may be punished for willfully or wantonly exposing the injured seaman to a known danger. This is a standard that a vessel owner can comply with, benefitting the seamen who work aboard the vessel and giving the owner an economic advantage over another who would pursue short term gain instead. The maritime industry can prosper under such a regime.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ELISE SANGUINETTI,
President
JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

ROBERT S. PECK
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
455 Massachusetts Ave. NW, Suite 152
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

February 28, 2019